91-121

Supreme Court, U.S.
F I L E D
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DUSKIN CLAUDE BECKER, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the use of a jackhammer to search beneath a driveway for residue of methamphetamine manufacturing exceed in scope or intensity the bounds set by a warrant to search residential premises for currency, documents, keys, photographs, narcotics, scales, mirrors, packaging material, razor blades, gems, computers, and computer equipment?

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PETITION FOR WRIT OF CERTIORARI

Duskin Claude Becker (hereinafter "petitioner"), by and through his undersigned attorney, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

REFERENCE TO OPINIONS BY OTHER COURTS

The opinion of the court of appeals (App. A1-A10) is reported at 929 F.2d 442 (9th Cir. 1991). The ruling of the district court (*id.* at A11-A12) is not reported .

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The date of the entry of the judgment sought to be reviewed (App. A1-A10) was March 29, 1991. The date of the order denying peti-

tioner's petition for rehearing (*id.* at A13) was June 6, 1991. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On June 2, 1989, a warrant was issued to search petitioner's residential premises for currency, documents, keys, photographs, narcotics, scales, mirrors, packaging material, razor blades, gems, computers, and computer equipment. App. A14-A17.

On June 3, 1989, state and federal agents executed the warrant. They searched petitioner's house and seized documents, photographs, marijuana, a pipe, cigarette papers, and a firearm. The agents next searched petitioner's combination shop and carport, where one of the agents examined the exhaust vent duct work and smelled a strong odor of methamphetamine in the main line running through the attic and the roof, and seized vent pipes, a fan, a sink drain elbow, a vent, a blender with foil chips, and branches from a nearby tree. App. A18-A21, A24-27.

One of the agents then observed that the concrete in the final portion of petitioner's driveway (i.e. the only portion of the driveway covered by the roof of the carport) appeared to have been poured more recently than the concrete in the uncovered portions of petitioner's driveway. Petitioner told the agent that the concrete under the carport had been poured after a search warrant had been executed at his neighbor's home on April 22, 1989. Documents seized during the

search of petitioner's house indicated that the concrete had been poured on or about May 19, 1989. App. A26.

Based upon the smell of methamphetamine located in the duct work and the suspicions raised by the recently poured concrete, one of the agents caused a jackhammer to be rented, and portions of the concrete to be removed. Pieces of aluminum foil were discovered under the concrete and were seized. App A27.

Washings from the sink drain elbow and the pieces of aluminum foil tested positively for the presence of methamphetamine. App. A22-A23.

On August 18, 1989, a warrant was issued to search "[t]he carport and soil located beneath the concreted carport" for "[c]hemicals, sludge, residue, methamphetamine or other narcotics, and paraphernalia used in the manufacture of methamphetamine or other narcotics to include glassware, chemical containers, tubing hot plates, scales, packaging materials, mirrors, aluminum foil, pots, pans, and ladles." On August 22, 1989, agents executed this warrant, and discovered and seized additional pieces of aluminum foil from under the concrete. This foil also tested positively for the presence of methamphetamine. App. A30-A33.

The government prosecuted petitioner as a result of the execution of the warrants. Petitioner moved to suppress each and every thing seized during the execution of the first warrant, and any and all evidence discovered or obtained as a result of those seizures.

On February 12, 1990, the district court granted petitioner's motion to suppress the evidence seized during the initial search under the concrete, finding that "the officers had plenty of time to obtain a warrant" and "[t]he search was obviously very intrusive in nature and as distinguished from the search of the other things." In addition, the district court granted petitioner's motion to suppress the evidence seized during the second search under the concrete, finding that the evidence seized during the initial search "form[ed] the basis for establishing probable cause to secure the . . . [second] warrant." App. A11-A12.

The government then filed an interlocutory appeal pursuant to 18 U.S.C. section 3731.

The court of appeals "reverse[d] the order of the district court suppressing the evidence obtained from underneath the concrete slab when the first and second warrants were executed." The court of appeals concluded that the initial search "did not violate the scope of the warrant nor was it unreasonably intensive," because the agents who executed the first warrant "had a warrant to search the premises for precisely the type of evidence found under the slab" and "had ample reason to believe that the concrete slab was being utilized to hide the very evidence they were legally on the premises to find." In addition, the court of appeals concluded that, "[b]ecause the initial search was not unreasonable, the evidence obtained from it was properly used as the basis for establishing probable cause to obtain the second warrant." App. A7-A10.

Petitioner filed a petition for rehearing. The petition for rehearing was denied. App. A13.

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. section 3231.

ARGUMENT

"[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant." *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 394 n. 7 (1971). "[T]he scope of a lawful search is 'defined by the object of the search and the places in which there is probable cause to believe that it may be found.'" *Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987). "The permissible intensity of the search within the described premises is determined by the description of the things to be seized." 2 LaFave, *Search and Seizure*, section 4.10(d), at 324 (2d ed. 1987).

The first warrant in this case did not authorize a search for the type of evidence (i.e. residue and aluminum foil) sought and found under petitioner's driveway. *Compare* the description in the first warrant of things to be seized (currency, documents, records, photographs,

keys, narcotics, scales, mirrors, packaging material, razor blades, gems, computers, and computer equipment) *with* the description in the second warrant of things to be seized ("[c]hemicals, sludge, residue, methamphetamine or other narcotics, and paraphernalia used in the manufacture of methamphetamine or other narcotics to include glassware, chemical containers, tubing, hot plates, scales, packaging materials, mirrors, aluminum foil, pots, pans, and ladles").

The first search beneath the driveway exceeded in scope and intensity the bounds set by the first warrant.

Jay W. Frank

JAY W. FRANK
Attorney for Petitioner

JULY 1991

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. DUSKIN CLAUDE BECKER, *Defendant-Appellee.*	No. 90-30095 D.C. No. CR-89-60106-1 ORDER AND OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Chief District Judge, Presiding

Argued and Submission Deferred
November 5, 1990—Portland, Oregon
Resubmitted March 8, 1991

Order and Opinion Filed March 29, 1991

Before: Eugene A. Wright, Herbert Y. C. Choy and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

SUMMARY

Search and Seizure

Reversing a district court order suppressing evidence, the court of appeals held that the government's use of a jackhammer to search beneath a concrete slab located on premises for which a search warrant had been issued was not unreasonable.

A warrant was issued to search the residence of Duskin Claude

Becker. Agents executing the warrant rented a jackhammer to break a newly-poured concrete pad near a shop located on the property. Becker admitted that the concrete had been poured after a search warrant had been executed at his neighbor's home. Pieces of foil discovered under the concrete were seized. The foil tested positively for methamphetamine. A second warrant was issued, specifically authorizing the search of the carport and soil located beneath the concreted carport. Additional pieces of foil were discovered and seized from under the concrete slab. This foil also tested positively for methamphetamine. The district court granted Becker's motion to suppress the evidence. The government appealed.

[1] The court initially rejected Becker's contention that the court's appellate jurisdiction was defeated by the government's late filing of the section 3731 certificate. While delay in the filing of a section 3731 certificate is not to be regarded with favor, it does not rise to jurisdictional dimensions. **[2]** Deciding the merits of the case, the court concluded that the agents' search by means of a jackhammer did not violate the scope of the warrant, nor was it unreasonable. **[3]** The initial warrant to search Becker's premises was valid and broad. Although the district court found that the officers had sufficient time to obtain an additional warrant, it was unnecessary for them to do so as they already had a warrant to search the premises for precisely the type of evidence found under the slab. **[4]** However, a determination that a search beneath the slab was within the scope of the first warrant did not end the court's inquiry. **[5]** After examining the facts and circumstances of this case, the court concluded that the manner of the search did not render it unreasonable. Before jackhammering the slab and searching beneath it, the officers found evidence of the manufacture of methamphetamine in the shop next to the slab. Documentary evidence indicated that the concrete had been poured very recently. Thus, the agents had ample reason to believe that the concrete slab was being utilized to hide the very evidence they were legally on the premises to find. **[6]** Because the initial search was not unreasonable, the evidence obtained from it was properly used as the basis for establishing probable cause to obtain the second warrant. Therefore, the district court's suppression of the evidence found beneath the slab was reversed. **[7]** However, the court lacked jurisdiction to consider Becker's expanded arguments by which he

contended the district court should have suppressed all of the evidence obtained by the searches of Becker's entire premises.

COUNSEL

Deborah J. Dealy-Browning, Assistant United States Attorney, Eugene, Oregon, for the plaintiff-appellant.

Jay W. Frank, Moule & Frank, Eugene, Oregon, for the defendant-appellee.

ORDER

This case is resubmitted for decision on March 8, 1991.

OPINION

THOMPSON, Circuit Judge:

In this interlocutory appeal, the government appeals the district court's order suppressing evidence obtained by using a jackhammer to search beneath a concrete slab located on premises for which a search warrant had been issued. We have jurisdiction pursuant to 18 U.S.C. § 3731 (1988). We reverse.

FACTS

On June 2, 1989, a warrant was issued to search the residence of the defendant, Duskin Claude Becker. In particular, the search warrant authorized a search of

> 88852 Ross Lane, Springfield, Oregon located on the west side of Ross Lane approximately 1/4 mile from its junction with the McKenzie Highway, also known as Highway 126. The residence is single story, brown in color with cedar shake trim, and wood framed. The residence is surrounded by a cyclone fence and includes a brown colored shop with a metal roof in the backyard. A mail box to the right of the driveway depicts the name D. BECKER on it.

On June 3, 1989, agents from state and federal investigatory agencies executed the search warrant. At this time, agents observed a newly-poured concrete pad located near the shop. Documentary evidence seized during the search indicated that the concrete had been poured on or about May 19, 1989. Becker admitted that the concrete had been poured after a search warrant had been executed at his neighbor's home.

Agents then rented a jackhammer and removed portions of the concrete slab. Pieces of aluminum foil were discovered under the concrete and were seized. The foil tested positively for the presence of methamphetamine.

On August 18, 1989, a second warrant was issued to search the premises. This warrant specifically authorized the search of "[t]he carport and soil located beneath the concreted carport . . . ." On August 22, 1989, agents executed this warrant and discovered and seized additional pieces of aluminum foil from under the concrete slab. This foil, too, tested positively for the presence of methamphetamine.

On February 12, 1990, the district court granted Becker's motion to suppress the evidence obtained as a result of the initial search under the concrete pad, finding that "the officers had plenty of time to obtain [another] warrant" and "[t]he search was obviously very intrusive in nature . . ." Reporter's Transcript of Proceedings, February 12, 1990, at 38 (Motions Hearing). Further, "[t]o the extent that [evidence seized during the initial search] . . . form[ed] the basis for establishing probable cause to secure the . . . [second] warrant authorizing the search below the concrete pad," the district court also suppressed the evidence seized from under the concrete pad during the second search. Id. at 39.

The government then filed this interlocutory appeal pursuant to 18 U.S.C. § 3731.

DISCUSSION

A. Jurisdiction

A threshold issue we must address is whether we have appellate jurisdiction to hear this interlocutory appeal from the district court's ruling on the motion to suppress. Notwithstanding the *dicta* in *United States v. Eccles*, 850 F.2d 1357, 1359-60 (9th Cir. 1988), we conclude that we do.

"As a general rule, an order by a district court denying or granting a motion to suppress is not an appealable final order under . . . [28 U.S.C. §] 1291. Such an order is 'but a step in the criminal case preliminary to a trial thereof,' and is thus interlocutory." *People of the Territory of Guam v. Mafnas*, 721 F.2d 683, 685 (9th Cir. 1983) (quoting *DiBella v. United States*, 369 U.S. 121, 131 (1962)). Congress, however, broadened the government's right to appeal when it enacted 18 U.S.C. § 3731. *United States v. Wilson*, 420 U.S. 332, 337 (1975). "[T]he legislative history of [section 3731] makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *Id.*

Under 18 U.S.C. § 3731

> [a]n appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [sic] suppressing or excluding evidence not made after the defendant has been put in jeopardy and before the verdict . . ., if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

In the present case, Becker's counsel asserted for the first time at oral argument on November 5, 1990 that the government had not filed the required certificate with the district court. We deferred submission of the case to allow the government to respond to this newly-presented issue. On November 8, 1990, the government filed the certificate with the district court, and on November 13, 1990, moved this court for permission to supplement the record on appeal with the filed certificate. Becker opposed the motion citing *United States v. Eccles*, 850 F.2d 1357, 1359-60 (9th Cir. 1988).

In *Eccles*, the government failed to provide the requisite certificate to the district court until after this court heard oral argument. *Id.* at 1359. The Eccles court reluctantly permitted the late filing of the certificate, stating that

> [p]recedent . . . compels us to allow the government to perfect jurisdiction in this case by filing the appropriate certificate after oral argument. We recognize, however, that a general rule excusing the government from filing a certificate until after oral argument would eviscerate the statutory requirement that the United States attorney certify that the appeal has not been taken to delay trial. See 18 U.S.C. § 3731. We therefore follow the lead of the Fifth Circuit in United States v. Herman, 544 F.2d 791, 794 (5th Cir. 1977), and "serve notice upon [the government] that we will entertain no future section 3731 appeals unless the appropriate certificate is incorporated in the record on appeal."

Id. at 1359-60.

Here we choose to exercise our discretion to allow the government to supplement the record on appeal. *See* Fed. R. App. P. 10(e). Hence, the certificate is "'incorporated in the record on appeal'" (*Eccles*, 850 F.2d at 1360) (quoting Herman, 544 F.2d at 749)), and the government's appeal is not precluded by the *dicta* quoted from Eccles.

This exercise of our discretion is consistent with Fed. R. App. P. 3(a) which provides, in pertinent part, that the "[f]ailure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."[1] Thus, permitting the late filing of such a

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[1]The *Eccles* court stated that "[o]n its face, a failure to certify is a violation of the statute confirming the right to appeal." *Eccles*, 850 F.2d at 1360. While we agree that the complete failure to file a certificate would clearly constitute a violation of the statute, we do not read the statute as requiring the certificate be filed by a particular point in time. In this, the certificate is clearly distinguishable from the notice of appeal which must be filed within thirty days of the adverse ruling. 18 U.S.C. § 3731.

certificate falls within the discretion of the court. This result is also consistent with section 3731, which provides that "[t]he provisions of this section shall be liberally construed to effectuate its purposes."

Moreover, we find no indication that Becker has been prejudiced by the failure of the government to file the certificate earlier than it did. First, Becker was not incarcerated during the pendency of this appeal, but was free on bond. Second, any delay occasioned by this appeal has already been incurred and vacating this appeal would not prove curative.

Our decision to permit the record on appeal to be supplemented by the section 3731 certificate now filed in the district court is further buttressed by the fact that Becker's counsel deliberately obfuscated the issue by stating in his brief that he "disagree[d] with the government's statement that this court has jurisdiction pursuant to 18 U.S.C. section 3731." He gave no indication that he considered our appellate review was foreclosed by the circumstance of the unfiled certificate. Instead, he waited until oral argument to raise the issue. Had the issue been raised earlier, it could have been dealt with before this panel invested considerable time and energy in reading the briefs, reviewing the record, and preparing for oral argument.

[1] We reject the contention that our appellate jurisdiction is defeated by the late filing of the section 3731 certificate. In this, we are joined by the *Eccles* court. In *Eccles*, the court adjudicated the case before it. In so doing, it is plain the court determined it had jurisdiction to decide the case. Indeed it did. As this Circuit stated in *Meier v Keller*, 521 F.2d 548, 553 (9th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), "[w]hile . . . delay [in the filing of a section 3731 certificate] is not to be regarded with favor, . . . it does not rise to jurisdictional dimensions." *Accord United States v. Wolk*, 466 F.2d 1143, 1146 n.2 (8th Cir. 1972); *United States v. Kleve*, 465 F.2d 187, 189-90 (8th Cir. 1972); *United States v Welsch*, 446 F.2d 220, 224 (10th Cir. 1971).

B. The Suppression of Evidence

[2] Turning to the merits of the case, the issue is whether the use of

a jackhammer to search beneath the concrete slab was unreasonable. "A warranted search is unreasonable if it exceeds in scope or intensity the terms of the warrant." *United States v. Penn* 647 F.2d 876, 882 n.7 (9th Cir.) (en banc), *cert. denied*, 449 U.S. 903 (1980). Whether officers exceeded the scope of a warrant during a search is reviewed de novo. See *United States v. McLaughlin*, 851 F.2d 283, 286 (9th Cir. 1988). The question of unreasonable intensity can only be resolved by reviewing the facts and circumstances of each case. *See Penn*, 647 F.2d at 883. Upon review, we conclude that the agents' search did not violate the scope of the warrant nor was it unreasonably intensive.

[3] The initial warrant to search Becker's premises was valid and broad. *See id.* at 881 (officers with warrant for premises could have "dug up the whole yard to find the heroin"). It was sufficient to permit a search of Becker's yard as the home and yard were within a single fenced enclosure. *See Rutherford v. Cupp*, 508 F.2d 122, 122 (9th Cir. 1974), *cert. denied*, 421 U.S. 933 (1975). The concrete slab was located within and was part of the yard and, thus, searching beneath it was clearly within the scope of the warrant. *See Penn*, 674 F.2d at 881. Although the district court found that the officers had sufficient time to obtain an additional warrant, it was unnecessary for them to do so as they already had a warrant to search the premises for precisely the type of evidence found under the slab. See *United States v. Morris*, 647 F.2d 568, 573 (5th Cir. 1981) ("Appellant has not cited us one case in which this or any other court has required a second, or for that matter third, fourth, fifth, etc., search warrant to validly search an area within the scope of an existing warrant, and we are not inclined to do so.").

[4] A determination that a search beneath the slab was within the scope of the first warrant, however, does not end our inquiry. Reasonableness in scope "can be vitiated . . . by the manner in which the police conducted the search . . . . Claims that otherwise reasonable searches have been conducted in an unconstitutionally unreasonable manner must be judged under the facts and circumstances of each case." *Penn*, 647 F.2d at 882-83.

It is plain that while the destruction of property in carrying out a

search is not favored, it does not necessarily violate the fourth amendment. *Tarpley v. Greene*, 684 F.2d 1, 9 (D.C. Cir. 1982). "[O]fficers executing search warrants on occasion must damage property in order to perform their duty." *Dalia v. United States*, 441 U.S. 238, 258 (1979). The standard is reasonableness: "destruction of property that is not reasonably necessary to effectively execute a search warrant may violate the Fourth Amendment." *Tarpley*, 684 F.2d at 9.

Whether a search is unreasonable because of its intolerable intensity must be determined by the particular facts of each case. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("what is reasonable depends on the context within which a search takes place."); *United States v. Nates*, 831 F.2d 860, 864 (9th Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988) (no precise formula exists for determining what constitutes reasonable search).

[5] After examining the facts and circumstances of this case, we conclude that the manner of the search did not render it unreasonable. Before jackhammering the slab and searching beneath it, the officers found evidence of the manufacture of methamphetamine in the shop next to the slab. Becker acknowledged that the concrete slab had been poured within the preceding 45 days, shortly after his associate's home across the street had been searched. Documentary evidence indicated that the concrete had been poured very recently. Further, the slab was located next to the shop, and the shop appeared to have been recently and hastily repainted and repaired. Thus, the agents had ample reason to believe that the concrete slab was being utilized to hide the very evidence they were legally on the premises to find. The only way to obtain this evidence was to use a jackhammer to break up the concrete. While the use of such a destructive search technique may, under other circumstances, be intolerably intensive, under the facts presented to us in this appeal, the use of a jackhammer to break the concrete slab and search beneath it was not unreasonable.

[6] Because the initial search was not unreasonable, the evidence obtained from it was properly used as the basis for establishing probable cause to obtain the second warrant. Thus, the district

court's ruling suppressing the evidence found beneath the slab when the second warrant was executed is reversed, as is the district court's order suppressing the evidence found beneath the slab when the first warrant was executed.

C. Defendant's Argument for Suppression of Additional Evidence

Becker argues that the execution of the first warrant violated the knock-notice statute (18 U.S.C. § 3109) and that the second warrant was unauthorized and illegal. He contends that as a result, not just the evidence the district court suppressed, but all evidence seized during the searches should be suppressed. We lack jurisdiction to consider these expanded issues in this section 3731 appeal.

A defendant may not file a cross appeal to a section 3731 interlocutory appeal. *United States v. Halbert*, 436 F.2d 1226, 12227 (9th Cir. 1970) (no statutory or case authority supporting right to appeal). We may consider, however, any argument advanced by a defendant that provides an alternative ground upon which to affirm the district court. *See id.* (court could consider defendant's contention that *Miranda* warnings not properly administered). What we may not consider is any defense argument seeking suppression of additional evidence which the district court did not suppress. *See Eccles* 850 F.2d at 1362.

CONCLUSION

[7] The government's motion to supplement the record on appeal with the section 3731 certificate which has now been filed with the district court is GRANTED. We have jurisdiction over this appeal. We reverse the order of the district court suppressing the evidence obtained from underneath the concrete slab when the first and second warrants were executed. We lack jurisdiction, however, to consider the defendant's expanded arguments by which he contends the district court should have suppressed all of the evidence obtained by the searches of Becker's entire premises.

The district court's suppression order is REVERSED and this case is REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUSKIN CLAUDE BECKER,

Defendant.

No. 89600106-1

February 12, 1990

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE OWEN M. PANNER

DUPLICATE ORIGINAL

APPEARANCES:

For the Plaintiff: Deborah J. Dealy-Browning

For the Defendant: Jay Frank.

* * * * *

THE COURT: All right. With respect to the pad, it appears to me the officers had plenty of time to obtain a warrant. The search was obviously very intrusive in nature and as distinguished from the search of the other things.

I am going to suppress the evidence that was obtained from the samples of dirt and the aluminum foil that the officers received as a result of their search under the pad. To the extent that these items form the basis for establishing probable cause to secure the August 18th warrant authorizing the search below the concrete pad, I am going to suppress any evidence seized during the execution of that

later warrant as well. The shop was within the expressed terms of the warrant, and with respect to the shop, there is no basis for supressing any of that evidence.

MR. FRANK: Your Honor?

THE COURT: So I am going to deny suppression of the evidence. . . .

* * * * *

FILED
JUNE 6, 1991
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. DUSKIN CLAUDE BECKER, Defendant-Appellee.	No. 90-30095 D.C. No. CR-89-60106-1 ORDER

Before: WRIGHT, CHOY and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

In the Matter of the Search of

88852 ROSS LANE
SPRINGFIELD, OREGON

SEARCH WARRANT
CASE NUMBER: CR 89-60035

TO: Bruce M. Kramer, Special Agent, IRS and any Authorized Officer of the United States

Affidavit(s) having been before me by BRUCE M. KRAMER who has reason to believe that on the premises known as 88852 Ross Lane, Springfield, Oregon located on the west side of Ross Lane approximately 1/4 mile from its junction with the McKenzie Highway, also known as Highway 126. The residence is single story, brown in color with cedar shake trim, and wood framed. The residence is surrounded by a cyclone fence and includes a brown colored shop with a metal roof in the backyard. A mail box to the right of the driveway depicts the name D. BECKER on it. in the District of OREGON there is now concealed a certain person or property, namely

See attached list of "Records and Evidence to be Seized".

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of the warrant.

YOU ARE HEREBY COMMANDED to search on or before within 10 days

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a writ-

ten inventory of the person or property seized and promptly return this warrant to MICHAEL R. HOGAN as required by law.

6/2/89 4:00 pm at EUGENE. OREGON

M. HOGAN MAGISTRATE /s/ Michael R. Hogan

RECORDS AND EVIDENCE TO BE SEIZED

a. United states currency

b Personal telephone and address books showing the names of drug distributors and drug customers

c. Wire transfer records, money orders, and cashier's checks

d. Bank account records, including checking and savings

e. Travel records, receipts, airline tickets, auto rental agreements

f. Receipts, invoices, and other memoranda disclosing acquisition of assets, and personal or business income and/or expenses

g. Records of drug sales and purchases

h. False identification documents

i. Financial statements

j. Federal and state tax records

k. Loan records

l. Mortgages, deeds, titles, certificates of ownership and registration documents

m. Records disclosing investments in securities

n. Safe deposit box rental records and keys

o. Photographs of associates in the manufacture and distribution of drugs

p. Narcotics and records pertaining to the manufacture and distribution of controlled substances

q. Controlled substance paraphernalia, i.e., scales, mirrors, packaging material, and razor blades

r. Recipes for manufacture of methamphetamine or other controlled substances

s. Gems and gemology reports

t. Computers; computer components; computer peripherals; word processing equipment; computer programs: computer and peripheral system documentation manuals; operating instructions: any and all software, including any system or application software, and documentation required to access and reproduce any data contained in any electronic storage media such as originals or copies of computer or word processing storage media, including discs, diskettes, tapes, or other electronic files pertaining to any and all computer records and any and all related supporting documentation that pertains to any such records referred to above.

Inventory of Items Seized Under—AUTH'Y OF A WARRANT—
06-03-89

At 88852 ROSS LANE	In the City of SPRINGFIELD
Case - JERRY STEWART	By S/A BRUCE M. KRAMER

Rm # Description & Room — Where Found

A 1 2 VIDEO TAPES
Found in The LIVING ROOM - IN DRAWER W. END LIVING ROOM-GJR

B 1 MISC RECEIPTS & PAPERS
Found in The KITCHEN - TOP N. END COUNTER-SMD

B 2 TAX RETURNS
Found in The KITCHEN - TOP OF REFRIGERATOR-RH

D 1 RECEIPT

Found in The FRONT BEDROOM - BEHIND OAK DRESSESER -SMD

D 2 MISC RECEIPTS AND PAPERS
Found in The FRONT BEDROOM - FLOOR NEAR BEDSIDE TABLE-SMD

D 3 MISC PHOTOS & PAPERS
Found in The FRONT BEDROOM - IN BOX NEAR FOOT OF BED-SMD

D 4 RENTAL AGREEMENT/LETTER
Found in The FRONT BEDROOM - TOP OF DRESSER-JP

E 1 MARIJUANA BONG
Found in The MASTER BEDROOM - LFT HD CORNER/DESK-JNP

E 2 MISC. DOC. & TAX FORMS
Found in The MASTER BEDROOM - TOP LFT HD SIDE DESK-JNP

E 3 MARIJUANA GLASS JARS
Found in The MASTER BEDROOM - TOP CENTER/DESK-JNP

E 4 MISC PAPERS
Found in The MASTER BEDROOM OVERHEAD CENTER DESK-JNP

E 5 MISC PAPERS
Found in The MASTER BEDROOM TOP RIGHT HD SIDE DESK-JNP

E 6 MARIJUANA SEEDS
Found in The MASTER BEDROOM CENTRAL DESK DRAWER-JNP

E 7 BOOK, PAPERS, HASH OIL-RH
Found in The MASTER BEDROOM DESK

F 1 MISC PAPERS
Found in The LOFT/ATTIC TOP OF DESK-JNP

F 2 TAX & BANK RECORDS
Found in The LOFT/ATTIC TOP DRAWER/BLK FIL'G CABI NET-JNP

F 3 MISC TAX FILES
Found in The LOFT/ATTIC BOTTOM DRAWER/BLK FILE CBNT.-JNP

F 4 DATE & PMT BK
Found in The LOFT/ATTIC TOP RIGHT HD DRAWER/DESK -JNP

F 5 BANK RECORDS
Found in The LOFT/ATTIC TOP OF S. END FILE CABINET -JNP

F 6 FILES AND RECORDS
Found in The LOFT/ATTIC BTTM DRAWER S. END FILE CAB.-JNP

F 7 MISC PAPERS
Found in The LOFT/ATTIC — BOTTOM DRAWER/BLACK DRESSER-JNP

F 8 MISC PHOTOS, NEG. & TAPES
Found in The LOFT/ATTIC — MISC GAMES BOX-TB

F 9 MISC PHOTOS, MARIJUANA & CONTNR-RH
Found in The LOFT/ATTIC — BOX MARKED/PHOTOS, COATS&JCKTS-RH

F 10 SIFTER W/WHT POWDER REVENUE

Found in The LOFT/ATTIC — BOX MARKED CLOTHES, SUMMER ETC-TB

F 11 M P-35;.25:SN:547049/05P LCLN CTY
Found in The LOFT/ATTIC — BOX MARKED CLOTHES & HATS-TB

K 1 VENT PIPE
Found in The OUTBUILDING — ROOF OF BUILDING-DM

K 2 ELBOW VENT PIPE
Found in The OUTBUILDING — INSIDE CARPORT-DM

K 3 IN LINE VENT FAN
Found in The OUTBUILDING — INSIDE CARPORT-DM

K 4 8" VENT PIPE
Found in The OUTBUILDING — INSIDE MAIN ROOM-DM

K 5 SINK DRAIN ELBOW
Found in The OUTBUILDING — MAIN ROOM-JS

K 6 INSULATION VENT
Found in The OUTBUILDING — ATTIC-DM

K 7 BLENDER W/FOIL CHIPS
Found in The OUTBUILDING — ON FLOOR-DM

K 8 BRANCHES FROM TREE
Found in The OUTBUILDING — HANGING ABOVE OUT-BUILDING-DM

N 1 MARIJUANA & PLASTIC CONTAINER
Found in The BOAT — CARDBOARD BOX-CENTER BOAT-TB

0 1 RECEIPT
Found in The OUTER LAWN AREA — GRASS NEXT TO HOUSE CARPORT-TB

P 1 MISC PAPERS
Found in The PUMP HOUSE — IN GARBAGE CAN

Department of State Police
CRIME DETECTION LABORATORY
3620 Gateway St., Springfield, OR 97477 (726-2590)

June 6, 1989

Robert E. Deu Pree, Chief
Police Department
344 North A
Springfield, OR 97477

ATTN: Harrison

Re: Becker, Duskin C.
Agency Case 89-8650
CDL 89E-1438

Described below is a summary of the analytical findings concerning the referenced exhibits submitted by your agency and received on June 5, 1989 via R. Harrison:

Exhibit 1 - One ziplock plastic bag labeled "IN DIRT - CARPORT" containing aluminum foil adhering to concrete. Examination of washings from the aluminum foil revealed a mixture of P-2-P and methamphetamine.

Clandestinely manufactured methamphetamine has typically been manufactured by the following method:

Phenylacetic acid and lead acetate are refluxed (cooked) for several hours, eventually yielding the crude phenyl-2-propanone (P-2-P). The P-2-P is then distilled for the second part of the reaction.

P-2-P is combined with methylamine, mercuric chloride and aluminum foil. After approximately 6 hours, the exothermic reaction ceases, producing the methamphetamine oil layer and remaining contaminated sludge. Note: All parts of the reaction and compo-

nents of the P-2-P reaction will be contaminated with methamphetamine and other products (as seen in Exhibit 1).

The methamphetamine oil is precipitated with acid, filtered and washed, producing the methamphetamine salt.

Exhibit 2 - One ziplock plastic bag labeled "SINK DRAIN ELBOW MAIN ROOM" containing a small section of white plastic pipe. Examination of washings from the pipe walls was positive for methamphetamine.

The remaining items are not examined at this time.

Emil E. Brandaw, Superintendent

By /s/ K D Meneely

Kenn D. Meneely, Criminalist

1276-90

KDM:mr

cc: DA, Lane County

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

In the Matter of the Search of The carport and soil beneath the concreted carport at the south end of the shop behind the residence known as 88852 Ross Lane, Springfield, Oregon.	APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT CASE NO: 89-60035

I Bruce M. Kramer being duly sworn depose and say:

I am a Special Agent, Criminal Investigation Division, IRS and have reason to believe that on the property known as The carport and soil located beneath the concrete carport at the south end of the shop behind the residence known as 88852 Ross Lane, Springfield, Oregon. This residence is single story, brown in color. The residence and brown colored shop is surrounded by a cyclone fence. A mail box to the right of the driveway depicts the name D. Becker on it.

in the District of Oregon there is now concealed a certain person or property, namely Chemicals, sludge, residue, methamphetamine or other narcotics, and paraphernalia used in the manufacture of methamphetamine or other narcotics to include glassware, chemical containers, tubing, hot plates, scales, packaging materials, mirrors, aluminum foil, pots, pans, and ladles, which is the fruits, proceeds, and evidence of the offenses of manufacturing and distributing narcotics and conspiring to manufacture and distribute narcotics in violation of Title 21 United States Code, Section(s) 841 and 846. The facts to support the issuance of a Search Warrant are as follows:

See attached affidavit

Continued on the attached sheet and made a part hereof.

[X] Yes [ ] No

/s/ Bruce M. Kramer

Sworn to before me, and subscribed in my presence

8/18/89 at Eugene, Oregon

JUDGE JAMES M. BURNS /s/ James M Burns

AFFIDAVIT

STATE OF OREGON)

)

County of Lane)

I, Bruce M. Kramer, state that:

1) Attached and incorporated herein, as I fully set forth, is an affidavit dated April 14, 1989 (attachment A) that I prepared regarding search warrants served on April 22, 1989 upon the residence, person, and automobile of JERRY DONALD STEWART.

2) Attached and incorporated herein, as if fully set forth, is an affidavit dated June 2, 1989 (attachment B) that I prepared regarding search warrants served on June 3, 1989 upon the residence, person, and vehicles of DUSKIN CLAUDE BECKER.

3) On June 3, 1989, during the course of the search warrant served at the residence of DUSKIN CLAUDE BECKER, located at 88852 Ross Lane, Springfield, Oregon, a brown colored shop with a metal roof located in the backyard was searched. I observed a pad of concrete covering a carport area under the south end roof area of this shop which DUSKIN CLAUSE BECKER told me had been laid following the search warrant served on the residence of JERRY DONALD STEWART on April 22, 1989. Documents seized durlng the search of DUSKIN CLAUDE BECKER's residence stated that the concrete was poured on May 19, 1989.

4) Police officers searched the shop located in the backyard of BECKER's residence, and Detective Donald Myers of the Springfield Police Department told me that he observed that the interior of the shop had recently been painted. All cabinets, ceilings, and walls were painted white and the floor had been painted red. There were a series of exhaust vents running the length of the dark

room and back room of the shop and white paint had been sprayed up into the vents to a depth of approximately 12 to 18 inches. New rubber splashboards had been installed, and the sink had been removed. The paint job appeared to be a hurried project as the floor had not been painted under an upright safe and an extension cord hanging under a cabinet had the end sprayed white. DUSKIN CLAUDE BECKER is a contractor and professional painter by trade. This did not appear to be of professional quality. Detective Myers told me that he examined the exhaust vent duct work and that he smelled a strong odor of methamphetamine in the main line running through the attic and the roof.

5) Based upon the smell of methamphetamine located in the duct work and the suspicions raised by the recently poured concrete pad in the carport located under the south end roof of the shop, I caused a jackhammer to be rented, and portions of the concrete to be removed. Pieces of shredded aluminum foil were discovered under the concrete and were seized for later analysis.

6) I know from being present during the search on June 3, 1989, that the earth located underneath the holes broken through the concrete pad with the jackhammer was loose and spongy, as if the earth had been dug up and then replaced before the concrete pad was poured.

7) Detective Richard Harrison of the Springfield Police Department took the pieces of shredded aluminum foil and a small white plastic drain pipe seized from the main room area of the shop to the Oregon State Police Laboratory in Springfield, Oregon, for analysis. Kenn D. Meneely, OSP Criminologist, has reported that examination of washings from the aluminum foil revealed a mixture of P-2-P and methamphetamine. Meneely reports that P-2-P is a product of a reflux action of phenylacetic acid and lead acetate during the first portion of the manufacture of methamphetamine. Meneely also reports that his examination of washings from the white plastic drain pipe was positive for methamphetamine .

8) Based upon my experience as a law enforcement officer who has participated in many search warrants, I know that police officers, during the course of a search warrant, escalate the thoroughness of

the search based upon the discovery of evidence and the degree that evidence is secreted. My experience is that aluminum foil with traces of P-2-P and methamphetamine contained on it and buried under a recently laid concrete slab would be cause to escalate the level of a search.

9) Internal Revenue Agent Sam Twidale told me on August 17, 1989, that Jay Frank, DUSKIN CLAUDE BECKER's attorney, told him that DUSKIN CLAUDE BECKER had been physically located at a residential construction site in Fall River Mills, California assisting his father, CLAUDE C. BECKER, and that he has not been present at his residence at 88852 Ross Lane, Springfield, Oregon.

10) On August 17, 1989, I personally viewed the residence bearing the address 88852 Ross Lane, Springfield, Oregon, which I know to be the residence of DUSKIN CLAUDE BECKER. I looked at the carport area of the shed located behind the residence from a public right-of-way (Ross Lane) and I saw that the concrete pad located in the carport area of the shed does not appear to have been disturbed since June 3, 1989, when police officers jackhammered holes through it. The holes have been filled in and a car and other items, such as paint cans, lumber, and the like, are stored on it.

11) I personally viewed the residence bearing the address 88852 Ross Lane, Springfield, Oregon on August 17, 1989, and it can be described as a single story, brown in color, with cedar shake trim, wood framed residence located on the west side of Ross Lane, north of the McKenzie River Highway. The residence, including a brown colored shop in the back yard, is enclosed by a cyclone fence. The cemented carport is located under the south end covered portion of the brown shop.

12) Based upon my personal experience, my training, and my conversations wlth other law enforcement officers involved in drug enforcement, I know that is is common for people associated with drug dealers/manufacturers to have in their possession paraphernalia used in the manufacture of methamphetamine such as glassware, chemical containers, aluminum foil, scales, hot plates, and connecting tubing. I know that these items are necessary evidence for the

investigation of narcotics violations.

I declare under penalties of perjury that the foregoing is true and correct.

/s/ Bruce M. Kramer

Bruce M. Kramer

Special Agent, IRS-CID

Sworn and subscribed before me this 18 day of Aug 1989.

/s/ James M Burns

/s/ Judge

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

In the Matter of the Search of
The carport and soil beneath the concreted carport at the south end of the shop behind the residence known as 88852 Ross Lane, Springfield, Oregon.

SEARCH WARRANT

CASE NO: 89-60035

TO: Bruce M. Kramer, Special Agent, IRS and any Authorized Officer of the United States

Affidavit(s) having been made before me by Bruce M. Kramer who has reason to believe that on the property known as The carport and soil located beneath the concreted carport at the south end of the shop behind the residence known as 88852 Ross Lane, Springfield, Oregon. This residence is single story, brown in color. The residence and brown colored shop is surrounded by a cyclone fence. A mail box to the right of the driveway depicts the name D. Becker on it.

in the District of Oregon there is now concealed a certain person or property, namely Chemicals, sludge, residue, methamphetamine or other narcotics, and paraphernalia used in the manufacture of methamphetamine or other narcotics to include glassware, chemical containers, tubing, hot plates, scales, packaging materials, mirrors, aluminum foil, pots, pans, and ladles.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before within 10 days (not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) and

if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to U.S. Judge or Magistrate as required by law.

2:00 PM 8/18/89 at Eugene, Oregon

JUDGE JAMES M. BURNS /s/ James M Burns

[X] EVIDENCE/PROPERTY [ ]

CASE NO. 89-5031

SPRINGFIELD POLICE DEPARTMENT

SEARCH WARRANT
88852 ROSS LN
8-22-89 0840 8-22-89 0840
TEST FOIL IN #4&3 FOR
METH & PRECURSOR CHEMICALS

BECKER, DUSKIN
88852 ROSS LN. OR
BECKER, PHYLLIS
SAME OR

NO.	QTY.	ITEM
1	1	SECTION OF FOIL - FROM GARDEN NEXT TO POST
2	1	SECTION OF FOIL - FROM EDGE OF GARDEN
3	1	SECTION OF CONCRETE WITH FOIL ATTACHED TO BOTTOM -FROM NEXT TO DOOR
4	1	SECTION OF FOIL - FROM UNDER PAD NEXT TO DOOR

D. MYERS E482 8-22-89 1500

Department of State Police
CRIME DETECTION LABORATORY
3620 Gateway St.,
Springfield, OR 97477 (726-2590)

September 1, 1989

Robert E. Deu Pree, Chief
Police Department
344 North A
Springfield, OR 97477

ATTN: Myers

Re: Becker, Duskin
Becker, Phyllis
Agency Case 89-5031
CDL 89E-2090

Described below is a summary of the analytical findings concerning the referenced exhibit(s) submitted by your agency and received on August 24, 1989 via L. Gray:

Exhibit	Description	Contents
1 (4)	small piece of stained aluminum foil	methamphetamine
2	section of aluminum foil adhering to the underside of a chunk of cement	methamphetamine

Emil E. Brandaw, Superintendent

By /s/ K D Meneely

Kenn D. Meneely, Criminalist
1276-90

KDM:mw

cc: DA, Lane County

Supreme Court, U.S.
FILED
AUG 23 1991
OFFICE OF THE CLERK

(2)

No. 91-121

In the Supreme Court of the United States

OCTOBER TERM, 1991

DUSKIN CLAUDE BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

4

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-121

DUSKIN CLAUDE BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing evidence on the ground that the search warrants for his residence did not authorize agents to destroy a concrete slab in his yard.

1. On January 4, 1990, petitioner was indicted by a grand jury sitting in the United States District Court for the District of Oregon. He was charged in a superseding indictment with conspiring to commit and conceal the offenses of manufacturing methamphetamine, possessing the drug with intent to distribute it, and distributing methamphetamine, in violation of 21 U.S.C. 846; and with

two counts of manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1).

Petitioner moved to suppress evidence seized by government agents in the execution of search warrants for his residence. The agents found the evidence under a concrete slab by using a jackhammer. On February 12, 1990, the district court suppressed the evidence on the ground that "[t]he search was obviously very intrusive in nature." Pet. App. A11-A12.

The court of appeals reversed. Pet. App. A1-A10. The court held that, under the circumstances of this case, the use of a jackhammer to search beneath the concrete slab was reasonable. The court said that "while the destruction of property in carrying out a search is not favored, it does not necessarily violate the fourth amendment." Pet. App. A8-A9. The court noted that before jackhammering the concrete slab, the agents found evidence of the manufacture of methamphetamine in the shop next to the slab; the agents knew the slab had been poured very recently, shortly after a warrant had been executed for the house of one of petitioner's associates; and the shop appeared to have been recently and hastily repainted and repaired. *Id.* at A4. Under these circumstances, the court held that the search technique, which might have been intolerably intrusive in other circumstances, was not unreasonable. *Ibid.*

2. Petitioner contends (Pet. 4-5) that the Fourth Amendment was violated because the use of a jackhammer to search beneath his driveway for residue of methamphetamine exceeded in scope and intensity the bounds set by the warrants. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of

appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45035

* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.